UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the matter of:

EDWIN RAMOS AND MICHELLE AVA STOUBER-RAMOS, — Case No. 10-23019-rdd, Chapter 7

Debtors.

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MODIFIED BENCH RULING ON
MOTION FOR CONTEMPT AGAINST BANK OF AMERICA, NA

APPEARANCES:

For the Debtor: MICHAEL H. SCHWARTZ, ESQ.
Michael H. Schwartz & Associates, PC
One Water Street
White Plains, NY 10601

Hon. Robert D. Drain

I have before me a motion by the debtors, Mr. and Mrs. Ramos, for an order holding their mortgage lender, Bank of America, in contempt for violation of their discharge, under sections 524 and 727 of the Bankruptcy Code. This case was reopened under section 349 of the Bankruptcy Code for the sole purpose of permitting the debtors to bring this motion. The motion to reopen was on notice to Bank of America; the present motion also was served on Bank of America, including on its general counsel.

Both motions asserted a course of conduct pursuant to which Bank of America, with knowledge of the debtors' bankruptcy and discharge (it was a scheduled creditor), continued to send the debtors monthly statements in which it sought to collect its debt from them. Those efforts, as will be discussed in a moment, were not confined to informing the debtors what they needed to pay or otherwise do in order to retain their house, on which Bank of America asserts a lien; they also clearly involved collection on the debt personally from the debtors. In addition, the motions referred to numerous phone calls from agents of Bank of America who sought to collect on the debt personally from the debtors.

Bank of America has not objected to the motion and has not appeared at today's hearing to controvert the motion’s

allegations or otherwise explain its conduct.

Although Bank of America was served with both motions, and the debtors' counsel has represented that he has diligently attempted to contact Bank of America to have it cease sending such statements and making such phone calls, I have been provided with a recent statement showing that the billing activity has continued since the service of the motion.

The law is clear that the Court has the power to enforce the discharge which is set forth in this case in an order that is attached to this motion, and that a violation of the discharge under section 524(a)(2) of the Bankruptcy Code is punishable by contempt. See In re Nassoko, 405 B.R. 515, 520 (Bankr. S.D.N.Y. 2009), and the cases cited therein. The Nassoko case also makes it clear that the enforcement of the discharge order may be made by means of a contempt motion as opposed to an adversary proceeding that would be governed by the Part VII rules of the Bankruptcy Code, id. at 526, citing among other cases In re Texaco Inc. 182 B.R. 937, 945-46 (Bankr. SDNY 1995). So, procedurally, this motion is proper.

For a finding of contempt, the burden rests with the movant to show by clear and convincing evidence that the offending entity has knowledge, actual or constructive, of the

discharge and willfully violated it by continuing with the activity complained of. Id. at 520 quoting In re Torres, 367 B.R. 478, 490 (Bankr. S.D.N.Y. 2007). And Nassoko also stands for the proposition that compensatory damages, in addition to, of course, sanctions, may be awarded as a sanction for civil contempt if a party willfully violates the section 524(a)(2) injunction.

Attorney's fees may also be awarded if, in addition to willfully disobeying the Court's order, the party acts in bad faith, vexatiously, wantonly or for oppressive reasons. Id., citing In re Dabrowski, 257 B.R. 394, 416 (Bankr. S.D.N.Y. 2001).

Here, in this context for this type of relief, willfulness consists of knowingly going forward with collection activity in respect of an in personam debt knowing or having reason to know that the debtor was in bankruptcy and has received a discharge. That's certainly alleged here, and it's consistent with the facts, which show that Bank of America was provided with notice of both the bankruptcy and the discharge as well as the fact that the collection activity continued after this case was reopened for the specific purpose of enforcing the discharge and after this motion was filed.

The lender here, which asserts a mortgage on the debtors' house, has the ability to enforce that mortgage and may inform a debtor of that right and may give a debtor information to establish how the debtor can avoid the enforcement of the mortgage, i.e. paying the debt or negotiating a settlement or modification of the debt. That is because a discharge is of in personam debt and does not affect a creditor's lien rights. However, and the law is clear on this, unless the lender's communications with the debtor clearly and conspicuously make that distinction – that is, if the communications to the debtor instead simply say, "You need to pay this debt", the lender will be in contempt of the discharge injunction. See, for example, In re Stuart, 2010 Bankr. Lexis 2041 at *3 (Bankr. N.D. Cal., June 21, 2010); In re Harlan, 402 B.R. 703, 714-16 (Bankr. W.D. Va., 2009); In re Anderson, 348 B.R. 652, 661 (Bankr. D. Del. 2006); In re Curtis, 322 B.R. 470, 484-85 (Bankr. D. Mass 2005).

This distinction should be particularly clear to Bank of America, since the District Court for the Western District of Virginia has twice ruled that where Bank of America did clearly make notice in its billing to a debtor that the bill was solely for information purposes in respect of the enforcement of the lien, as opposed to for any other

purpose, and it made it clear that the debt itself was discharged, it would not be in contempt of a discharge order, but otherwise would have been. See Pearson v. Bank of America, 2012 U.S. Dist. LEXIS 94850 at *14-16 (W.D. Va. July 10, 2012) and Anderson v. Bank of America, 2012 U.S. Dist. LEXIS 95309 at *8-10 (W.D. Va. July 11, 2012).

I have reviewed the statements sent by Bank of America to the debtors that are attached as exhibits to the contempt motion before me, going through June 1, 2013. Each of them fails to make the distinction that Bank of America obviously knows how to make because they made it in the Pearson and Anderson cases that I just cited. They say nothing about the debtors' discharge. They say nothing about the fact that the bill is being sent for information purposes and only in respect of the bank's lien interest on the house. And, in addition, they state, among other things, "Bank of America N.A. will proceed with collection action until your account is brought fully current." They do that on each bill. And it says, "You are responsible for paying the bill." Obviously, that language seeks to enforce a debt not simply in respect of the house upon which Bank of America has or asserts a mortgage but, instead, against the debtors directly and, therefore, it is in contempt of the discharge order – clearly.

I would also note that to the extent that the debtors through their counsel have represented to me at today's hearing that the loan has been sold to someone else, that very sale could be also in violation of the discharge order. See In re Nassoko, 405 B.R. 520-22.

Clearly the attorney's fees here are warranted as actual damages.

In addition, particularly given that Bank of America knows how to do this properly, as evidenced by the two Western District of Virginia cases that I've cited, coercive sanctions are warranted, and they're especially warranted given the fact that Bank of America apparently has ignored this matter notwithstanding being served twice and having been given an opportunity to correct the problem, which it has not done. Instead, it has continued to send the bills. So it will be sanctioned $10,000.00 a month until it corrects this matter payable to the debtors through their attorney. My reasoning behind that sanction is that this is not just a stupid mistake. This is a policy. And frankly, $10,000.00 a month plus attorney's fees may not mean much to Bank of America, but at least it will send a message that other attorneys may pick up on.

Dated: White Plains, New York
October 1, 2013

/s/Robert D. Drain
UNITED STATES BANKRUPTCY JUDGE